No. 13,025

United States Court of Appeals

For the Ninth Circuit

E. R. Crain and Finton J. Phelan, Jr., on Behalf of Themselves and Other Persons Similarly Situated,

Appellants,

vs.

The Government of Guam,

Appellee.

APPELLANTS' BRIEF.

Appeal from the District Court of Guam, Territory of Guam.

Crain & Phelan,
Suite 101 Aflague Building, Route 8, Agana, Guam, M.I.,
Attorneys for Plaintiff-Appellants.

Subject Index

Table of Authorities Cited

Constitutions

Statutes

Texts

Miscellaneous

No. 13,025

United States Court of Appeals
For the Ninth Circuit

E. R. Crain and Finton J. Phelan, Jr., on Behalf of Themselves and Other Persons Similarly Situated,

Appellants,

vs.

The Government of Guam,

Appellee.

APPELLANTS' BRIEF.

Appeal from the District Court of Guam, Territory of Guam.

JURISDICTIONAL STATEMENT.

This cause was filed in the District Court of Guam seeking a declaratory judgment to determine the construction to be placed upon Section 31 of Public Law 630, 81st Congress, Chapter 512, 2nd Session. (The Organic Act of Guam.) The Plaintiffs are citizens of the United States residing in the unincorporated territory of Guam. The action is filed as a class action, since a judicial determination of this question is deemed to be of major importance to all residents of Guam. Section 2201, Chapter 151 of title 28 United

States Code Annotated gives to United States District Courts the jurisdiction to enter declaratory judgments interpreting Statutes of the United States. The District Court of Guam was created by Section 22 (a) Public Law 630, 81st Congress, Chapter 512—2nd Session, approved August 1950. Section 23 (a) of Public Law 630, 81st Congress, Chapter 512—2nd Session created in the United States Court of Appeals for the Ninth Circuit, jurisdiction of Appeals from the District Court of Guam in all cases involving Laws of the United States or any authority exercised thereunder.

This action, seeking a judicial determination of the construction of a law of the United States and equitable relief, if appropriate, is therefore within the Appellate jurisdiction of the United States Circuit Court for the Ninth Circuit.

The Complaint was filed on the 17th day of April 1951, Return of Service filed on the 20th day of April 1951. A Motion to Dismiss, by the Defendant, was filed and served upon the 9th day of May 1951. Hearing upon the Motion was on the 15th day of May, 1951 and the Judgment and Order entered and filed on the 16th day of May, 1951 dismissing the Complaint without leave to amend. Notice of Appeal was filed and served on the 13th day of June 1951. It is from this Judgment and Order that the Plaintiffs appeal.

This Act created a Civil Government for the Island of Guam, declared Guam to be an unincorporated ter-

ritory of the United States, and set forth therein the powers and limitations of the newly constituted government together with a Bill of Rights.

The government of Guam, through the Governor and other officials, after the passage of the "Organic Act", made claim that Section 31 of said Act (which reads in its entirety as follows)

> "The income tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam",

created a local territorial income tax and implanted into the codes of Guam the text of the United States income tax laws, substituting the word Guam for United States and substituting other words when necessary to give such law local application. I.T. 4046 issued by the Commissioner of Internal Revenue of the United States agreed with this interpretation of Section 31 and stated that thus a local territorial income tax was created. Accordingly public notices were caused to be published by the government of Guam and demand was made for the payment of this income tax to the local treasury through a Commissioner of Taxes for Guam.

The Plaintiffs contend that no local income tax was created by this Section or any other Section of the "Organic Act", that for many years prior to the passage of the "Organic Act", the entire Revenue Code of the United States had applied, subject to certain express exemptions contained therein, to Guam;

that Section 31 of the "Organic Act" constituted merely a saving clause to insure that despite the provisions of Section 25 (b) of the "Organic Act"

> "(b) Except as otherwise provided in this Act, no law of the United States hereafter enacted shall have any force or effect within Guam unless specifically made applicable by Act of the Congress either by reference to Guam by name or by reference to 'possessions'."

all income tax laws of the United States would apply, both at present and in the future, to Guam; and that the "Organic Act" in no way suspended, repealed or modified the Internal Revenue Code of the United States.

Accordingly, the Plaintiffs on the 17th day of April 1951, filed a Complaint (pg. 3 of Transcript) on behalf of themselves and others similarly situated, against the government of Guam seeking a declaratory judgment that the Internal Revenue Code of the United States applies to Guam, that the unincorporated territory of Guam has the status of a possession, that the government of Guam is a government of limited and express powers, that the income tax laws of the United States are not repealed or suspended by the "Organic Act", that the "Organic Act" of Guam does not create a territorial income tax and containing a prayer to restrain the government of Guam, i.e., its officers and agents, from attempting to collect the alleged territorial income tax.

The return of service of the complaint in this action was filed on April 20, 1951 (pg. 7 of Tran-

script). The Defendant, appearing specially, filed and served on May 9, 1951 a Motion to Dismiss (pg. 7 of Transcript), based on five grounds as follows:

That the action is an improper class action.

That an indispensable party was not joined.

That the court lacks jurisdiction over the Defendant.

That the court lacks jurisdiction over the subject matter.

That the complaint fails to state a claim upon which relief can be granted.

This Motion was argued on the 15th day of May 1951 in the District Court of Guam. The Court dismissed the Complaint on the grounds that it had no jurisdiction over the Defendant and that the Court could not take jurisdiction of the subject matter. The Order and the Opinion of the Court were filed on May 16, 1951. (Pg. 9, Pg. 14 of Transcript).

The Plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on June 13, 1951. (Pg. 14 of Transcript).

It is contended by the Appellants that the Court erred in the following matters:

1. The Court did not exercise sound discretion in refusing Plaintiffs' oral motion for an extension of time to properly prepare and present points and authorities in opposition to Defendant's motion to dismiss. The motion and ruling of Court are set forth in the minutes of the Clerk.

2. The Court erred in holding that the government of Guam was immune to suit. Transcript of Record page 13.

> "It has been held that territorial governments so created are immune from suit without their consent even when the "Organic Act" provided that they could be sued. People of Porto Rico v. Ramos 34 S. Ct. 416, 232 U.S. 627; A. J. Trestani Sucrs Inc. v. Bussoglia, 166 F. 2d 966.
>
> The Government of Guam has not consented to this action against it and it is the court's opinion that it is immune from suit without its consent. It follows that the court has no jurisdiction over the defendant."
>
> (Pg. 13 of Transcript).

> "The Court: It places the government as a sovereignty beyond the jurisdiction of the United States Court, unless the Congress of the United States specifically gave it jurisdiction or unless the Government of Guam, by its own act, submitted itself to jurisdiction. It is the old theory that the king can do no wrong; the government can submit itself to suit and if it does so, it, of course, is liable like any other litigant, but if it chooses not to do so and if it is an independent sovereignty, then the courts have no jurisdiction over the actions of the government."
>
> (Pg. 19 of Transcript).

3. The court erred in holding that it could not assume jurisdiction of the subject matter of the suit.

> "The purpose of the action is to obtain a declaratory judgment to the effect that the Government of Guam has no authority to impose or

collect a tax under the provisions of Sec. 31, supra, but that this section must be construed in relationship to other applicable provisions of the United States Internal Revenue Code; that any tax imposed by Sec. 31 is the concern of the United States Government and not the Government of Guam. Even assuming that the Government of Guam had waived its immunity from suit, this court could not take jurisdiction. As was stated in Noland v. Westover, et al., 9 Cir., 172 F. 2d 615:

> The only definite relief asked is for a declaratory judgment, but the statute authorizing the district court to render a declaratory judgment does not authorize its application in controversies in respect of tax problems. 28 US CA, 2201; Red Star Yeast and Products Co. v. La Biddle, 7 Cir., 83 F. 2d 394; Wilson v. Wilson, 4 Cir., 141 F. 2d 599." (Pg. 13 of Transcript).

SPECIFICATION OF ERROR I.

The learned District Judge denied the oral motion of Plaintiffs for adequate time to properly prepare and present points and authorities in opposition to Defendant's motion to dismiss. (Clerk's minutes) Five grounds were cited in support of this motion. This motion was served upon Plaintiffs on the 9th day of May 1951, and argued on the 15th day of May 1951. The court stating in the Opinion (page 12 of Transcript) that

> "In view of the dependence of the Government of Guam on the proceeds of the income tax to

> meet its budgetary requirements and the public importance of the question, the court has gone further in outlining its views as to the creation of a tax liability than would be required to dispose of the motion to dismiss."

Nevertheless the court refused to permit Plaintiffs additional time to present authorities in opposition. In view of the vast public importance of the matter before the court and the fundamental and basic nature of the Points of Law to be researched and presented, denial of additional time for research and study was not the exercise of sound discretion. Reason demands that in a case of this nature the court should be fully advised and that all authorities in point be searched and presented to the court. Denial of additional time precluded this and deprived the court of the benefit of such research and authorities.

It is contended that denial of this motion deprived Plaintiffs of an opportunity to adequately present their case and further resulted in the court deciding a motion in a case of grave public import without an adequate and complete presentation of the law involved. It is contended that matters of such importance should be presented upon briefs and only after adequate research. The Plaintiffs were not granted the necessary time, and the court was deprived of the benefit of such research. It is believed that in exercising sound discretion the court should have granted the motion for more time and secured the benefit of such study. The court deprived itself of an adequate presentation of the pertinent cases and au-

thorities and deprived the Plaintiffs of an opportunity to present authorities favorable to them. To decide a case of this import upon inadequate research and authorities is, it is contended, not the exercise of sound discretion and therefore, error.

SPECIFICATION OF ERROR II.

The learned District Judge held that the government of Guam is immune to suit without its consent.

It is contended by Appellants that the court erred by so holding for the following reasons:

That Congress did not create a sovereignty when it established the government of Guam is apparent from the Provisions of Public Law 630—(The Organic Act)—pertinent portions of which read as follows:

> "Section 3. Guam is hereby declared to be an unincorporated territory of the United States . . . The government of Guam . . . shall be under the general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct."
>
> "Section 6 (a) The executive authority of the government of Guam . . . shall be exercised under the supervision of the department or agency referred to in Section 3 of this Act . . ."
>
> "Section 6 (c) The Governor shall coordinate and have general cognizance over all activities of a civil nature of the departments, bureaus and

offices of the Government of the United States in Guam."

"Section 8. The head of the department or agency designated by the President under Section 3 of this Act may from time to time designate the head of an executive department of the government of Guam or other person to act as Governor in case of a vacancy in the office, or the disability or temporary absence of both the Governor and the Secretary, and the person so designated shall have all the powers of the Governor for so long as such condition continues."

"Section 19. . . . All laws enacted by the legislature shall be reported by the Governor to the head of the department or agency designated by the President under Section 3 of this Act, and by him to the Congress of the United States, which reserves the power and authority to annul the same. If any such law is not annulled by the Congress of the United States within one year of the date of its receipt by that body, it shall be deemed to have been approved."

This Act nowhere contains a grant of sovereignty. Sovereignty and its incidents have been defined:

"Vattel, in his Law of Nations (book 1, page 1) says: 'From the very design that induces a number of men to form a society which has its common interests, and which is to act in concert, it is necessary that there should be established a public authority to order and direct what is to be done by each in relation to the end of association. This political authority is the sovereignty, and he and they who are invested with it are the

sovereign. Sovereignty in government may then be defined to be that public authority which directs or orders what is to be done by each member associated, in relation to the end of the association.'

It may be remarked, with us, the body of the nation has kept in its own hands the empire, or the right to command, and our government is therefore called a 'popular government'."

Wheaton defines sovereignty,

"the supreme power by which any citizen is governed."

Hurd says:

"The supreme power in the state must necessarily be absolute, in being subject to no judge."

Jameson says:

"By the term 'sovereignty' is meant the person or body of persons in a state to whom there is politically no superior."

Leiber has said:

"The necessary existence of the state, and that right and power which necessarily follows is sovereignty."

Story says:

"By sovereignty, in its largest sense, is meant supreme, absolute, uncontrollable power; the jus summi imperii; the absolute right to govern."

Yeaman, in his Study of Government, (484) says:

"This sovereignty is the last and supreme will in the direction and control of the affairs of

society, and beyond or above which there is no political power, and no legal appeal. The word which by itself comes nearest being the definition of sovereignty is will or volition, as applied to political affairs. Government is not sovereignty. Government is the machine or expedient for expressing the will of the sovereign power."

"Definitions of sovereignty might be almost indefinitely multiplied, but these which have been given I believe to be sufficient to give an accurate idea of its nature. This sovereign power in our government belongs to the people; and the government of the United States and the governments of the several states are but the machinery for expounding or expressing the will of the sovereign power." *Cherokee Nation v. Southern Kan. R. Co.,* 33 F. 900.

"(16) A. *Definition and Nature.* Sovereignty has been succinctly defined as the "supreme authority". Sovereignty has been as of two kinds—external and internal, according as it is viewed from without or from within. Internal sovereignty is that which is inherent in the people of any state, or vested in its rulers by its constitution or fundamental laws. External sovereignty consists in the independence of one political society in respect to all other political societies. A federal state enjoys external, but not internal, sovereignty, except as regards federal territory, such as colonies." 33 C.J. 395.

"(17) B. *Incidents of Sovereignty.* 1. Exclusive Jurisdiction. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself. No state can exer-

cise jurisdiction as of right within the territorial limits of another independent state." 33 C.J. 397.

"(18) 2. *Equality.* Equality of states is an incident of sovereignty for, if one is in right subject to another, the former is not sovereign. But equality in this sense means "equality before the law" and not in strength, resources, and influence." 33 C.J. 397.

The terms of the "Organic Law for Guam" are inconsistent with the definitions of sovereignty contained in the cited authorities. A sovereignty is not subordinate and under the supervision of an agency, department or of a government official.

Throughout the "Organic Act" the unincorporated territory of Guam is set off and distinguished from other Territories of the United States by use of the small letter "t" in territory and "g" in government while all other references throughout the Act to other Territories and Governments are capitalized. Thus there is clearly the recognition of a difference and a distinction between Guam and other Territories of the United States.

When Congress defined Guam as an unincorporated territory of the United States it clearly intended to distinguished Guam from Territories and to set such entity apart from them. It is obvious that the use of the word unincorporated must refer to the opposite of the concept conveyed by the word incorporated used with reference to other Territories and be intended to establish the opposite status. Yet considering the status, as disclosed by the following

cases of an incorporated Territory, even such do not possess more than a limited or qualified sovereignty.

> "* * * The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.
>
> In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States." *National Bank v. County of Yankton,* 101 U.S. 129, 133.

"It leaves in doubt what is meant by "State of the Union". Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as States, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, §§5, 6, 7. . . . But the whole argument fails when applied to a Territory. It is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the general government is no more independent than that of a city to the States in which it is situated, and which has given to it its municipal organizations." *Talbott v. Silver Bow County,* 139 U.S. 438.

"The people of the United States, as sovereign owners of the National Territories have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself, for it may well be admitted in respect to this, as to every power of society over its mem-

bers, that it is not absolute and unlimited. But in ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it." *Murphy v. Ramsey,* 114 U.S. 15.

"Strictly speaking, there is no sovereignty in a Territory of the United States but that of the United States itself." *Snow v. United States,* 18 Wall. 317.

"Mr. Justice Bradley delivered the opinion of the court. The government of the Territories of the United States belongs, primarily, to Congress; and secondarily to such agencies as Congress may establish for that purpose. During the terms of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government.

It is, indeed, the practice of the government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the organic act of Congress in each case, and is at all times subject to such alterations as Congress may see fit to adopt." *Snow v. United States,* 18 Wall. 317.

"There is, of course, no dispute as to the sovereignty of the United States over the Territory

of Washington or as to the consequent control of Congress. As an organized political division, the Territory possessed only the powers which Congress had conferred and hence the territorial legislature could not provide for escheat unless such provision was within the granted authority. Sere v. Pitot, 6 Cranch, 332, 337; American Ins. Co. v. Center, 1 Pet. 511, 543; National Bank v. Yankton County, 101 U.S. 129, 133." *Christianson v. King County,* 239 U.S. 356, 362.

"By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national, and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition. American Ins. Co. v. Canter, 1 Pet. 511, 542; Benner v. Porter, 9 How. 235, 242; Cross v. Harrison, 16 How. 164, 193; National Bank v. Yankton County, 101 U. S. 129, 133; Murphy v. Ramsey, 114 U.S. 15, 44; Mormon Church v. United States, 136 U.S. 1, 42, 43; McAllister v. United States, 141 U.S. 174, 181 * * * Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory." *Shively v. Bowlby,* 152 U.S. 1.

"* * * There may be a limitation on the exercise of sovereign powers, but that State is not sovereign which is subject to the will of another. This

remark applies equally to the Federal and State governments." *Thurlow v. The Commonwealth of Massachusetts,* 5 How. 587.

An incorporated Territory upon incorporation becomes a part of the United States and as such enjoys a special status under the Constitution. There has been a lack of distinction between Territory as a political entity and inchoate state and territories meaning a geographical area, a piece or parcel of real estate. Certain shades of meaning not given consideration were not carefully differentiated in many cases.

Congress, in Section 25 (b) of the Organic Act of Guam, clearly intended Guam to be a Possession in contemplation of law. Quoted ante page 4.

It is inconsistent with sovereignty to be a possession. A possession must be possessed and therefore the possessor who is the superior has the authority of sovereignty. It follows, therefore, that the subordinate cannot be a sovereign. These citations support this stand. *Snow v. United States,* 18 Wall. 317, cited ante page 16; *Thurlow v. The Commonwealth of Massachusetts,* 5 How. 587, ante page 18.

Under the United States Constitution the Federal government is of course sovereign and this sovereignty has been described as a limited and an external sovereignty. The constituent States are likewise sovereign. However, the United States was created by a union of separate and complete sovereignties who joined together as equals to create a new sovereign entity to which they, as sovereigns, delegated and

granted certain of their sovereign powers, at the same time reserving all other powers to themselves. They actually divided the concept of sovereignty of government and its powers into two distinct portions, the one external with respect to the rest of the Community of Nations, and the other the powers of a sovereignty within its own borders and area. This is not the case with the government of Guam. Guam had nothing. It is a pure creature of Congress. Guam was acquired by the United States by virtue of the Treaty of Paris; it was merely a piece or parcel of real estate transferred from the Crown of Spain to the United States; and its status under the Spanish Crown was that of a dependency over which Spain possessed sovereignty and ownership. It was not an organized political entity, being at best a rudimentary type of governmental agency, a true colony or possession.

The Island of Guam was not transferred to the United States as a political entity or state in being, but as a colony, or at most, an embryonic political community. It was not in any sense sovereign under Spain, the only sovereignty was that of Spain. When transferred to the ownership of the United States it became a piece or parcel of real estate owned by the United States. It became part of the outlying domain subject under the Constitution to control by Congress alone. The United States possess title to all dependencies, public domain and other property for and on behalf of the component States. Congress exercises ownership and holds title in like manner to a

trustee for and on behalf of the several States. The Island of Guam, of course, by the Treaty of Paris became a part of this property or domain.

The Treaty of Paris did not make Guam a part of the United States, it did convey ownership, full and complete, not only of title but also of sovereignty to the United States, who under our Constitution has full and complete control, political responsibility and authority over Guam.

The Constitution as disclosed by the following quotation answers this question.

> "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States or of any particular State." Art. IV, sec. 3(2) U.S. Const.

It has been said that Congress alone has authority over such a possession. How, therefore, can any government, agency or instrumentality created by Congress to carry out a responsibility or duty of Congress possess that which Congress has not seen fit to grant? Can the creature of Congress be greater than Congress, possess wider powers and of a higher order than other Congressional agencies?

Clearly the government of Guam is not a State. Such is obvious. It is not the government of an inchoate State, or of an incorporated Territory. What, therefor, is it?

It is, of necessity, in view of the provisions of the Constitution, a legislative government. As such it cannot possess more than granted to it or more than its creators could grant. The question is, was or could such grant of sovereignty be made?

Clearly Congress did not by the "Organic Act" create a sovereignty. Congress negatived such construction by the express restrictions which were spelled out in the "Organic Act". Guam having a legislative government, being a possession, must be subordinate to Congress.

Congress is the supreme legislature for Guam. It has authority to pass laws, repeal laws, limit authority as shown in the cases cited below.

National Bank v. County of Yankton, 101 U.S. 129, 133, ante Pg. 14;

Talbott v. Silver Bow Company, 139 U.S. 438, ante Pg. 15;

Murphy v. Ramsey, 114 U.S. 15, ante Pg. 16;

Snow v. United States, 18 Wall. 317, ante Pg. 16;

Shively v. Bowlby, 152 U.S. 1, ante Pg. 17.

> "Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision (Downes v. Bidwell) that the territory is to be governed under the powers existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation." *Rasmussen v. United States,* 197 U.S. 516.

"The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory other than the territory northwest of the Ohio River, (which belonged to the United States at the adoption of the Constitution) is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon

the acquisition of new territory, that they need no argument to support them. They are self-evident. Chief Justice Marshall, in the case of the American Insurance Company v. Canter, 1 Pet. 511, 542, well said: 'Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequences of the right to acquire territory. Which ever may be the source whence the power is derived, the possession of it is unquestioned.'

And Mrs. Justice Nelson, delivering the opinion of the court in Benner v. Porter, 9 How. 235, 242, speaking of the territorial governments established by Congress, says: 'They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of Territories, combining the powers of both the federal and statute authorities.' "

Chief Justice Waite, in the case of *National Bank v. County of Yankton,* 101 U.S. 129, 133, said: "In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a

void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States."

In a still more recent case, and one relating to the legislation of Congress over the Territory of Utah itself, *Murphy v. Ramsey,* 114 U.S. 15, 44, Mr. Justice Matthews said:

"The counsel for the appellants in argument seem to question the constitutional power of Congress to pass the act of March 22, 1882, so far as it abridges the rights of electors in the Territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States as sovereign owners of the national Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms."

"Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Consti-

tution from which Congress derives all its powers, than by any express and direct application of its provisions." *Mormon Church v. United States,* 136 U.S. 3.

"In treating of article IV, section 3, Judge Cooley, in his work on Constitutional Law, says: 'The peculiar wording of the provision (section 3, article IV) has led some persons to suppose that it was intended Congress should exercise, in respect to territory, the rights only of a proprietor of property, and that the people of the territories were to be left at liberty to institute governments for themselves. It is no doubt most consistent with the general theory of republican institutions that the people everywhere should be allowed self-government; but it has never been deemed a matter of right that a local community should be suffered to lay the foundations of institutions, and erect a structure of government thereon, without the guidance and restraint of a superior authority. Even in the older States, where society is most homogeneous and has fewest of the elements of disquiet and disorder, the State reserves to itself the right to shape municipal institutions; and towns and cities are only formed under its directions, and according to the rules and within the limits the State prescribes. With still less reason could the settlers in new territories be suffered to exercise sovereign power. The practice of the government, originating before the adoption of the Constitution, has been for Congress to establish governments for the territories; and whether the jurisdiction over the district has been acquired by grant from the

States, or by treaty with a foreign power, Congress has unquestionably full power to govern it, and the people, except as Congress shall provide for, are not of right entitled to participate in political authority, until the territory becomes a State. Meantime they are in a condition of temporary pupilage and dependence; and while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined.' Cooley, Principles of Constitutional Law, 164." *Dorr v. United States,* 195 U.S. 138.

". . . The authority of Congress over the public lands is granted by section 3, article IV, of the Constitution, which provides that 'the Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States.' In other words, Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of. The Nation is an owner, and has made Congress the principal agent to dispose of its property. Is it inconceivable that Congress, having regard to the interests of this owner, shall, after prescribing the main and substantial conditions of disposal, believe that those interests will be subserved if minor and subordinate regulations are entrusted to the inhabitants of the mining district or State in which the particular lands are situated? While the disposition of these lands is provided for by Congressional legislation, such legislation savors

somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term, and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands." *Butte City Water Company v. Baker,* 196 U.S. 119.

Thus it is apparent that Guam is not only to be governed solely by virtue of the inherent powers of Congress granted by the Constitution but that any agency or governing body erected or created by Congress to perform its duties is of its very nature a legislative agency or government.

Therefore, with relation to the United States, what status does a legislative government hold? Is it not similar and akin to that of a subordinate political entity such as a county, a city or a town? True it is organized. It is a government, it possesses law making powers, but all political entities do so within their sphere. However only sovereignties are free to enact such laws as they see fit without supervision and without restriction. Such is not the case with Guam.

It follows of necessity that such an agency or government must be akin to and possess the nature of a county, district or municipal government rather than that of an independent or sovereign government. These concepts are set forth in the following cases:

". . . A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the State." *East Hartford v. Hartford Bridge Co.,* 10 How. 511, 533, 534.

As is stated in the *United States v. Railroad Company,* 17 Wall. 322, 329, a municipal corporation is not only a part of the State but is a portion of its governmental power. "It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation."

In *New Orleans v. Clark,* 95 U.S. 644, 654, it was stated by Mr. Justice Field, in delivering the opinion of the court, that "A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, there-

fore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent, which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent."

In *Commissioners of Laramie County v. Commissioners of Albany County et al.*, 92 U.S. 307, it was held that public or municipal corporations were but parts of the machinery employed in carrying on the affairs of the State, and that the charters under which such corporations are created may be changed, modified or repealed as the exigencies of the public service or the public welfare may demand; that such corporations were composed of all the inhabitants of the territory included in the political organization; and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic.

It was said in that case that "public duties are required of counties as well as of towns, as a part of the machinery of the State; and, in order that they may be able to perform those duties, they are vested with certain corporate powers; but their functions are wholly of a public nature, and they are at all times as much subject to the

will of the legislature as incorporated towns, as appears by the best writers upon the subject and the great weight of judicial authority." *City of Worcester v. Worcester Consolidated Street Railway Co.* 196 U.S. 539.

". . . It is urged by the defendants that this court has no jurisdiction of this suit because of the eleventh amendment to the federal Constitution. That amendment is in these words: 'The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.' They cite authorities to the effect that a municipal corporation is an agent of the state government for local purposes, and contend, therefore, that a suit against such corporation and its officers is a suit against 'one of the United States,' within the meaning of that amendment. That such a corporation is such an agent is undoubtedly true, but it does not follow therefrom that a suit against it or its officers is such a suit. The most that can be said is that it is a suit against a subdivision of one of said states, not that it is a suit against one of said states itself. This being so, the amendment in question does not deny jurisdiction to the federal courts of the suit, for it denies to them jurisdiction only of suits against 'one of the United States' and not against a subdivision thereof. If the federal courts do not, by reason of said amendment, have jurisdiction of suits against municipal corporations, it is hard to understand upon what ground it has been that they have so

often taken jurisdiction of suits against them. So far as my research has gone, I have not found a case where it has been urged that federal courts do not have such jurisdiction, much less where it has been so held. The cases cited by counsel for defendants in support of the proposition that municipal corporations are state agencies for local purposes were mostly suits against municipal corporations, and in none of them was it suggested that the suits could not be maintained for want of jurisdiction; on the contrary, in each of them jurisdiction to dispose of them on their merits was exercised. I think it therefore clear that the jurisdiction of this court of this cause is not affected by this consideration." *Camden Interstate Ry. Co. v. City of Catlettsburg et al.,* 129 F. 421.

". . . It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity. Congress has express power 'to exercise exclusive legislation in all cases whatsoever' over the District of Columbia, thus possessing the combined powers of a general and of a State govern-

> ment in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes' could only authorize it to exercise municipal powers, and this is all that Congress attempted to do." *Stoutenburgh v. Hennick,* 129 U.S. 141.

There can be no question as to the existence of sovereignty over Guam and in Guam. However, it is the sovereignty of the United States. True, every governmental agency possesses, but not of its own essence, certain of the attributes of sovereignty. Such is possessed by virtue of the needs, desires, authority and for the benefit of its superior. It is not possessed by virtue of any innate authority; it is not essential to its existence and does not follow by virtue of the inflexible logic of its existence. The government of Guam can only possess such sovereignty, or in fact, such powers as may be specifically granted to it.

It cannot be as the learned trial Judge said:

> "The Court: It places the government as a sovereignty beyond the jurisdiction of the United States Court, unless the Congress of the United States specifically gave it jurisdiction or unless the Government of Guam, by its own act, submitted itself to jurisdiction. It is the old theory that the king can do no wrong; the government can submit itself to suit and if it does so, it, of course, is liable like any other litigant, but if it chooses not to do so and if it is an independent

sovereignty, then the courts have no jurisdiction over the actions of the government."

Transcript of Record Page 19.

Quoting American Jurisprudence on sovereignty

"§127. Generally.—The organization of a territory is solely in the hands of Congress. It may determine the form of the local government in a particular territory as well as the qualifications of the officers who shall administer it. In ordaining government for the territories and the people who inhabit them, all the discretion which belongs to the legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law from time to time the form of the local government in a particular territory and the qualifications of those who shall administer it. The form of government for the territories which Congress shall establish is not prescribed, and need not necessarily be the same in all territories. The form generally adopted is that of a quasi-state government, with executive, legislative, and judicial officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to that form." 49 Am. Jur. 335.

"§129. Generally.—In the territories the sovereignty of the United States is supreme and complete, and the powers of government exercised by the territories are only such as are authorized under the organic act creating the government of the territory, or by powers that are specially delegated. Within these limitations, operation of a territory is in the hands of the

inhabitants of the particular territory. This is true although a 'territory' is not a distinct sovereignty and has no independent powers. It is a political community organized by Congress, all of whose powers are created by Congress, and all of whose acts are subject to congressional supervision. Its attitude toward the Federal government is no more independent than that of a city to the state in which it is situated and which has given it its municipal organization." 49 Am. Jur. 335.

"§126. Delegation to Territorial Legislature; Control of Congress over Acts of Territorial Legislature.—When a territorial government is organized, Congress may delegate to the territorial legislature the power to enact legislation for the local government of the territory, as it has done in the various acts relating to territories and insular possessions. Once legislation is passed by the territorial legislature, it is the duty of the secretary of the territory to transmit to Congress copies of all laws enacted. These acts are subject to the disapproval of Congress, and may be amended or annulled at any time by that body, but they remain in force until Congress has exerted its authority to annul them. However, there is no presumption of an intention on the part of Congress to supersede a local territorial act in the absence of a clear expression to that effect.

Congress may not only abrogate laws of a territorial legislature, but it may make a valid act void, and a void act valid. Such a power is an incident of sovereignty, and continues until granted away, so that the failure of Congress to make express reservation in an organic act of the power

to amend or annul an act of the territorial legislature does not prevent it from exercising that power.

When the same matter is the subject of legislation by Congress and a territorial legislature, the acts of Congress supersede those of the territorial legislature. In conformity with the rule, there can be no doubt that an act of Congress undertaking to regulate commerce in the District of Columbia and the territories of the United States would necessarily supersede the territorial law regulating the same subject. If an act of Congress is inconsistent with the organic act organizing a territory or the District of Columbia, it is not for that reason invalid, for, since both acts emanate from Congress, the latter would govern. If Congress fails to notice or take action on any territorial legislation, the reasonable inference is that it approves such act." 49 Am. Jur. 335.

The holding of the court is in conflict with these authorities.

The court is reading into the "Organic Act" that which Congress did not put there. It is an interpretation of the law that is neither warranted by fact nor required by the necessity of the situation.

Guam differs in many essential respects from the Island of Puerto Rico and from the Philippine Islands. These two particular entities are, and for many years were, highly developed governments. They possessed a Structure of Government that was complete, they are organized into Provinces, Cities, Municipalities and smaller units. The problems in cases

involving those Islands differ vastly from the one before this court. This question is basic; it asks can the government of Guam refuse to submit to the authority of its creator; it is beyond the cognizance of the Courts of the United States unless it, of its own volition, decides to submit to such courts?

Can the government of Guam, by its own act, refuse to permit a court of the United States to construe a United States Statute? Can a Congressional Agency by its own interpretation expand a grant of Congress to place itself beyond reach of the Judicial Powers of the United States? We cannot concede such. To do so would permit any agency or instrumentality to hold that a part is greater than the whole.

The opinion of the trial court, if carried to its logical conclusion, says that a court of the United States is without power to determine for a Congressional creature the proper construction of a Statute of Congress; that the governmental agency created to perform a Congressional function is answerable to no one. Surely this is absurd.

This line of reasoning is based upon the series of cases popularly denominated the "insular cases". These cases discuss in detail the sovereignty of territories of the United States, the powers of the Congress with respect to a territory, and the extent to which the United States Constitution is extended and applies to territories. They hinge primarily upon these major points of law. First, to what extent does the United States Constitution apply to a territory; sec-

ond, how broad are the powers of the Congress with respect to a territory; third, the question as to the application of certain Federal laws to territories. It is fitting that these cases shoud be reviewed and considered to determine whether and to what extent they are controlling and in point when considering Guam.

Certain historical facts can be admitted without the necessity of submitting authorities: namely, that the Territory of Hawaii was an independent and sovereign nation at the time that by treaty it came within the sovereignty of the United States and became a Territory; and that the Philippine Islands, if not from the date of the Treaty of Paris, at least as early as the 14th day of February, 1899 were recognized as having a peculiar status, and that the intent of Congress with respect to them provides as follows:

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the United States to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the United States and the inhabitants of said islands." Cong. Rec., 55th Cong. 3d Sess. vol. 32, p. 1847.

This has culminated in the complete freedom of the Philippine Islands as a sovereign nation effective the 4th day of July, 1946, thus illustrating the fact that the continuing intent of Congressional policy has been, from the turn of the century, to regard the Philippine Islands as differing in their essential relationship to the United States from that of other territories appurtenant to the United States.

As to Puerto Rico, the Supreme Court determined in the cases of *Kopel v. Bingham* and *Gromer v. Standard Dredging Co.* that essentially Puerto Rico was for many reasons akin and similar to an unincorporated territory, differing in but few essential respects therefrom.

> ". . . it was said; 'it may be justly asserted that Puerto Rico is a completely organized Territory, although not a Territory incorporated into the United States, and that there is no reason why Puerto Rico should not be held to be such a Territory . . .' Kopel v. Bingham, 211 U. S. 468 . . . '. . . in considering the subject and giving due weight to "the precaution against abuse" of the Puerto Rican legislative power and after calling attention to the reservation made by Congress of the right to repeal any Puerto Rican act of legislation, it was nevertheless declared (p. 370): "The purpose of the act is to give local self-government, conferring an autonomy similar to that of the States . . ." ' " *Gromer v. Standard Dredging Company,* 224 U. S. 362, both quoted as authoritative in *People of Puerto Rico v. Rosaly y Castillo,* 227 U. S. 270.

Thus there has been repeated determination, judicial, legislative and historical of the exact status of these entities.

Further, in the "insular cases" culminating in the case of *Downes v. Bidwell* which is recognized as the leading authoritative "insular" case, the Supreme Court finally determined the precise status of all three and laid down the following standards:

> ". . . Congress has been consistent in recognizing the difference between the states and territories under the Constitution . . ." ". . . It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the cases in which those expressions are used. If they go beyond the cases, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision . . ." . . ". . . He further held that citizens who migrate to a territory cannot be ruled as mere colonists, and that, . . . Congress had the power of legislating over territories until states were formed from them . . ." . . ". . . It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory . . ." . . ". . . If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafter acquire, such limitation

should have been expressed. Instead of that we find the Constitution speaking only to states, except in the territorial clause, which is absolute in its terms, and suggestive of no limitation upon the power of Congress in dealing with them . . .'' . . ''. . . We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demands it . . . Choice in some cases, . . . may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs . . ., and the question at once arises whether large concessions ought not to be made for a time, . . . We decline to hold that there is anything in the Constitution to forbid such action . . .''

Thus, we have the conclusive determination that the territories are not States within the judicial clauses of the Constitution; that the territories are appurtenant to the United States; and that they are to be governed by the Congress under the territorial clause of the Constitution.

It is not open to question that with respect to territories appurtenant to the United States Congress alone is the supreme legislature, subject only to certain Constitutional prohibitions. Nowhere in any of these ''insular'' cases do we find any judicial determination or guide whatever as to what Congress may or must do.

The "insular cases" have decided whether certain clauses of the Constitution apply, by virtue of their inherent character, to all areas under United States sovereignty; whether certain laws of the United States apply to Puerto Rico, to Hawaii or to the Philippines; but nowhere in these cases do we find a discussion of whether or not there is any distinction between an organized territory and an entity specifically defined as a possession. We have been unable to find any rule of law which binds Congress in the exercise of its discretion in governing appurtenant territory. The only inference that can be drawn from the "insular cases" is that only the mandatory limitations of the Constitution restrict Congress in its complete freedom of action in governing appurtenant territories of the United States.

Inasmuch as these cases cannot be construed as limiting the discretion and latitude of choice open to the the Congress in the governing of territory appurtenant to the United States, we can only conclude that these cases while decisive as to the intent of Congress in past enactments, cannot be construed as binding with respect to other and later enactments.

These cases do not contain any statement distinguishing between a Territory akin to an Incorporated Territory and appurtenant territory specifically defined by Congress as being a possession.

Clearly, Congress had in mind the fact that there existed a legal significance in the use of the term "possession", and that a possession differed in some respects from a Territory. It would seem that except

for Constitutional limitation, Congress has absolute freedom of choice with respect to the ruling and government of a possession. In this case we feel that the intent of Congress with respect to Guam is the sole determining factor, and such intent cannot be determined by other expression of intent pertaining to other appurtenant territories of the United States prior to the passage of "The Organic Act for Guam".

Drawing the necessary distinction that Guam differs historically and presently in most basic respects from Puerto Rico, Hawaii and the Philippine Islands, and considering the controlling fact that the cases concerning these Territories are not conclusive upon Congress, we must then conclude that the intent of Congress is the final determining factor to be considered in deciding this question. The cases cited and the cases considered by appellants do not and cannot determine this question. We have under consideration a problem which has never been subjected to judicial scrutiny and evaluation. We must conclude that Guam is essentially different from Puerto Rico, Hawaii and the Philippine Islands and that Congress did not create a sovereignty by "The Organic Act of Guam". This is supported by the following citations:

Section 3 of "The Organic Act of Guam", ante pg. 9.

Section 6 of "The Organic Act of Guam", ante pg. 9.

Section 8 of "The Organic Act of Guam", ante pg. 10.

Section 19 of "The Organic Act of Guam", ante pg. 10.

"Sec. 25. (a) . . .

"(b) Except as otherwise provided in this Act, no law of the United States hereafter enacted shall have any force or effect within Guam unless specifically made applicable by Act of the Congress either by reference to Guam by name or by reference to 'possessions' . . ."

The learned District Judge did not distinguish between Guam and the other Territories. We believe that the following distinctions exist and must be drawn. We have States, Incorporated Territories (both organized and unorganized and being inchoate States), unincorporated Territories which are similar to incorporated Territories, and a final category, unincorporated territories or possessions having a government but not possessing the dignity and authority of a Territory. Guam, by Congressional enactment, can only fall into the last category.

Finally, from the text of "The Organic Act of Guam" itself and from our study of the "insular" cases cited herein, which cases we do not believe to have any bearing upon the question propounded here, it can only be concluded that Congress did not intend to create a sovereignty such as it created in the more mature dependencies of the United States, namely, Alaska, Hawaii, Puerto Rico and formerly, the Philippine Islands. Rather, Congress created a subordinate instrumentality for a specific purpose, that instrumentality being like in nature to other

Congressionally created agencies and instrumentalities of the Government of the United States, and like such other agencies and instrumentalities, the Government of Guam is not immune to suit and is subject to the jurisdiction of the courts of the United States.

SPECIFICATION OF ERROR III.

The learned trial Judge held that the Court could not take jurisdiction of the case.

It is contended that the Court was in error for the following reasons.

There is no controversy with respect to Federal Taxes, within the meaning of Section 2201 of Title 28, USCA, in the case before the Court. What is sought is a Declaratory Judgment as to the meaning of Public Law 630. It is submitted that the question before the Court is, does the "Organic Act of Guam" create a territorial tax or not?

It follows therefor that if the "Organic Act of Guam" does not create a territorial tax, the United States Income Tax Laws apply in full and as written. What is being questioned is not the United States Income Tax or its application, but whether or not this Act of Congress created a territorial Income Tax, thus incorporating, by reference, the text of the United States Income Tax Laws into the "Organic Act of Guam" and thereby into the Guam territorial statutes.

It is conceded that, whether Congress did or did not create a local income tax, nevertheless the United States Income Tax Law does apply to Guam. No question is raised as to the Federal Tax. The question is, do we have by virtue of the "Organic Act" a territorial tax also. As to United States Income Tax it is conceded that it is valid, there is no controversy. The question is, did this Act create a territorial income tax? We contend that it did not.

Section 2201 of Title 28, USCA, applies solely to controversies with respect to Federal income taxes. There is none here. To ask for a judgment that a Federal Law applies is not a controversy with respect to such law. The issue in this case is with respect to a territorial tax. What was sought was a ruling that no such tax was in existence but that the Federal Law governed, that the Federal Law applied, not the territorial. The controversy is with respect to the territorial tax. A controversy with respect to Federal Taxes or in fact any other tax, is one which questions the tax itself, its legality, its validity. The alleged territorial tax and its existence is being questioned, nothing else.

It is contended, that the learned trial Judge should have drawn this distinction, and that since what is questioned is whether or not there is a territorial tax, the controversy is about such territorial tax.

United States Courts have, by virtue of Section 1341 of Title 28, USCA, jurisdiction of controversies concerning state taxes, when no speedy or expedient

remedy is available in the courts of such State. It is submitted, that the controversy is, whether or not a territorial tax exists. Such controversy is specifically within the jurisdiction of a District Court of the United States.

The case cited below presents this distinction in a far more lucid manner than the draftsman of this brief and is considered to be in point on all fours.

> "The Defendant has also questioned the jurisdiction of this court under the Declaratory Judgments Act.
>
> Section 274d of the Judicial Code, 28 USCA, Par. 400 provided 'In cases of actual controversy except with respect to Federal taxes the Courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleading to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment and be reviewable as such.' Filipowicz v. Rothensies, Collector of Internal Revenue et al., 31 F. Supp. 716, 721, 722.
>
> In Union Packing Co. v. Rozan, D.C. 1937 17 F. Supp. 934, 940, the court declared 'It is the specific command of the Congress of the United States that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Revised Statutes Sec. 3224, 26 USCA, Par. 1543. This command which cannot be waived by agents of the government, Gouge v. Hart, (D C Va. 1917) 250 F 802, by

recent enactment, has been made to apply to declaratory judgments. The Statute excepts specifically actual controversies 'with respect to Federal Taxes'. Jud. Code Sec. 274d, as amended 28 USCA, Par. 400.

(9) The foregoing Judicial construction confirms the view of this court that the clause of the Declaratory Judgments Act, underlined above, was enacted for the purpose of continuing the legislative policy of Section 3224 of the Revised Statutes. Cases arising since the passage of the provision in issue have involved challenges to the validity of varied tax impositions and, as was to be expected, such questions were found not to be within the scope of a declaratory judgment. See W. B. Schaife and Sons v. Driscoll, 3 Cir. 1937, 94 F. 2d 664; Beeland Wholesale Company v. Dover, 5 Cir. 1937, 88 F. 2d 447; Aponaug Mfg. Co. v. Fly, D.C. 1937, 17 F. Supp. 944. Of course the result would be the same under Section 3224 of the Revised Statutes. See Simonin's Sons v. Rothensies, D.C. 1936, 13 F. Supp. 807. Compare Penn v. Glenn, D.C. 1935, 10 F. Supp. 483, in which the court held that where a purported tax actually was not a tax but an attempt to regulate something beyond the power of Congress to regulate, a declaratory judgment to that effect was proper. C. F. Vogt and Sons v. Rothensies, D.C. 1935, 11 F. Supp. 225, 231.

On the other hand there is no suggestion that the permissible scope of a declaratory judgment in this regard would be more restricted than that under Section 3224 of the Revised Statute.

(10) It would seem that Section 274d of the Judicial Code should be interpreted to deny a declaratory judgment to a petitioner only where the latter could not obtain an injunction under R.S. Section 3224 against illegal seizure by a tax collector. In fact such a rule would appear to be too restrictive inasmuch as there are cases where an equity court would refuse to grant an injunction because of the failure to state the need for equitable relief, while such a prerequisite would not be necessary for a declaratory judgment. In any event it would seem clear that if a court of equity could enjoin the collector for taking illegal action, a Federal court similarly should be able to issue a declaratory judgment without violating the inhibitions against decisions as to Federal taxes.

(11) Aside from analogy to cases under R.S. Section 3224, logically it is arguable that all that is sought is a declaration of the rights of the various interested parties to the fund in question. The tax collector claims by virtue of an alleged tax lien. Plaintiff claims by virtue of an alleged prior assignment. There will be no decision as to the propriety of the tax. There is no controversy over a Federal tax. There is, however, a controversy as to the alleged rights of various claimants to specific property.

In light of this analysis it would seem evident that a declaratory judgment as to the property rights of the parties involved would be permissible." *Filopowicz v. Rothensies, Collector of Internal Revenue,* 31 F. Supp. 716, 721.

It is contended that no further citation of authorities on this point is necessary, therefore in the interest of economy of time the Appellants rest as to the point.

CONCLUSION.

The Order appealed from should be reversed. Upon the law and the facts the learned District Judge should be instructed that the government of Guam is not a sovereignty, that the District Court can take jurisdiction over the government of Guam, that this cause does not constitute a controversy with respect to a Federal Tax, that the District Court does have jurisdiction of the subject matter of this suit. That in cases of this nature additional time for research and the presentation of authorities should be allowed before proceeding to a hearing.

The Order appealed from should be reversed, as error, and appropriate instructions furnished the District Court for its guidance.

Agana, unincorporated territory of Guam, 15th of October, 1951.

Respectfully submitted,

CRAIN & PHELAN,

Attorneys for Plaintiff-Appellants.